UNIVERSITY OF
TORONTO
FACULTY OF LAW

FREEDOM OF EXPRESSION AND THE PRESS

VOLUME 2

M. David Lepofsky

Fall 2008

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HATE PROPAGANDA AND RACIST SPEECH IN CANADA

INTRODUCTION

This chapter examines the troubling and difficult issues raised by hate propaganda, such as speech that is racist in nature, in the Canadian constitutional context. The following chapter will review the treatment of this issue in the U.S. constitutional jurisprudence.

This is among the most controversial and vexing of all free expression issues. Opponents to hate propaganda laws see this as the litmus test for our courts' commitment to the free speech values about which they speak so grandly in the abstract. Defenders of hate propaganda laws see this as the opportunity for Canadian courts to carve out a uniquely Canadian approach to free expression, which is divorced from perceived U.S. absolutism in this area.

Traditionally, debates over the propriety of speech restrictions in the hate propaganda and pornography fields focused on the immorality or socially harmful nature of such speech. In recent years, the ground on which these debates has shifted, as the proponents of restrictions on hate propaganda and pornography each rest their arguments on equality rights. They contend that proposed speech restrictions are necessary to protect and promote equality rights of women and minorities. In so doing, they take the high ground, and turn the debate into one in which fundamental rights are alleged to clash with each other. Consider how the injection of equality rights and equality rhetoric effects the free expression calculus.

The hate propaganda issue raises a diverse range of free expression questions. Among these are the following:

1. Does s. 2(b) protect all messages, regardless of their content? Should Irwin Toy secure a second look before this question is finally answered?

2. What is hate propaganda? Is this a discrete category of expression which can be adequately defined for legislative purposes?

3. What rationales are appropriate under s. 1 to justify limits on this kind of expression, if it secures s. 2(b) protection?

4. There are different legal tools available to combat this speech, including, for example, criminal laws, human rights legislation, and civil actions. Which of these is constitutionally appropriate?

This chapter will examine the three leading pronouncements in this area from the

Supreme Court of Canada. Each decision was handed down after the Supreme Court had ploughed much preliminary free expression terrain in the commercial speech cases, already considered. Each of the following cases considers a different legal tool for addressing hate speech.

R. v. Keegstra, [1990] 3 S.C.R. 697. Here the court considered the validity of s. 319 of the Criminal Code, which criminalizes the wilful promotion of hatred against identifiable groups based on grounds such as race or religion. In **Taylor et al v. Canadian Human Rights Commission** [1990] 3 S.C.R. 892, the court considered the constitutionality of provisions of the Canadian Human Rights Act which prevent the use of telephones for the dissemination of hate messages. In **R. v. Zundel** [1992] 2 S.C.R. 731, the court ruled on s. 181 of the Criminal Code, an acient provision which bans the deliberate spreading of false news which is injurious to the public interest. The first two charter challenges failed. The third succeeded. Each case found a breach of s. 2(b), and in each case, that finding was unanymous. In each case, there was a strong dissent filed on the application of s. 1 to the law under attack.

In reading these admittedly lengthy decisions, consider whether there are common threads running throughout the various opinions. Consider also whether the outcomes of these cases are consistent, and whether the various members of the court take consistent approaches from one case to the next.

In reviewing these materials, think ahead to upcoming materials on pornography. Contemplate the extent to which arguments regarding free speech and hate propaganda are similar to, or different from, arguments respecting free speech and pornography.

The Criminal Code Hate Propaganda Provision

R. v. Keegstra, [1990] 3 S.C.R. 697, Supreme Court of Canada

Keegstra was a high school teacher in Alberta. In 1984 Mr. Keegstra was charged under s. 319(2) (then 281.2(2)) of the Criminal Code with unlawfully promoting hatred against an identifiable group, by communicating anti-semitic statements to his students. He was convicted at trial.

Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". He taught his classes that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to

Notes and Questions

1. What are the key points on whieh the majority and dissent disagree? What are the key points on whieh they agree?

2. Can you glean from the two opinions a difference in certain presumptions about human nature?

3. Dickson states that under Irwin Toy, one does not look at the message's content to appraise its relationship to the values of a frce and democratic soeiety, but that this is properly done under s. 1. Is this appropriate? Should these matters be eonsidered under s. 2(b)? Should they be eonsidercd under s. 1? Why or why not?

4. Did the majority view the suppressed speech here as something more than just offensive? What if anything was the distinguishing feature in that expression that made it appropriate for permissible government prohibition? Is a formula offered by which other kinds of expression can bc appraised for possiblc prohibition in future cases?

5. Compare Dickson, C.J.C.'s views on the relative value served by the publication of falschoods vis a vis s. 2(b) valucs in Keegstra to thc discussion in Zundel, set forth in Chapter #, on the qucstion whether s. 2(b) constitutionally protects deliberate falsehoods. Are these views compatable? Could a judge be consistent in voting for Dickson in Keegstra, and for McLachlin in Zundel? Why or why not?

6. Thc majority and dissent take very different positions on thc relationship between hate propaganda and s. 2(b) values. What reasons do they give? With whom do you agree? Are there arguments on this issue that neither consider? What role does this viewpoint play in the analysis in each opinion?

7. Dickson protests that he does not advocate a "levels of scrutiny" approach to s. 2(b) claims. Mclaehlin took the same position in Rocket. Are they in fact using sueh an approach?

8. What standard do the majority and dissent respeetively employ under s. 1's rational conncetion test? How effective must a law be proven to be at promoting its aims to satisfy the court, according to each justice? Do they use the same or different tests in answering this question?

9. Compare the "rational connection" standard employed here with that which the court uses unanymously in Butler infra, in the discussion of pornography legilsation. Are these the same or different standards?

10. How does one go about meeting the burden of proof under the rational eoneetion standard

as contemplated here? Did the court refer to evidence about the actual impact of the hate laws on combatting racism, etc.? If not, what was each judge's conclusion based upon?

11. The majority defines the "wilful" standard in s. 319 quite strictly. How would the Crown meet this burden of proof in a specific case?

12. The majority rejects the view of the Alberta Court of Appeal that it would be necessary to show proof that a statement actually caused hatred before a conviction could constitutionally be registered. Which view do you prefer? How would the Crown prove hatred as having occurred? What inquiry does a trial court undertake if actual hatred is not the appropriate standard? What implications does this ruling have for other s. 2(b) restrictions which are putatively enacted to prevent specific harm such as pornography, false advertising, and the like?

13. In Keegstra, there was argument over the risk that law enforcement officials might abuse hate propaganda provisions to prosecute people who engage in legitimate expression. Whose response to this issue do you find the most compelling? Is this relevant to the appraisal of the constitutionality of a section of a statute? Why or why not?

14. McLachlin, J. suggests that if U.S. First Amendment doctrine were applied to s. 319 of the Code, this law would be characterized as content-based and not viewpoint-based suppression of expression. Is this right? What is the difference between the two?

15. Mclachlin, J. states in her s. 2(b) discussion that "Freedom of expression guarantees the right to loose one's ideas on the world; it does not guarantee the right to be listened to or to be believed." Do you agree? What are the broader implications of this proposition for the construction of s. 2(b)? Does the majority decision take a similar or different approach to s. 2(b)?

16. McLachlin, J. states in her s. 1 discussion: "It is not the statements of Mr. Keegstra which are at issue in this case, but rather the constitutionality of s. 319(2) of the Criminal Code." Does the majority take the same view? Is this constitutionally correct? Can it be squared with the contextual approach to Charter analysis which she otherwise supports? What impact, if any, on the case's disposition flows from this view?

17. McLachlin, J., accepts that this law's aims are sufficiently important to override s. 2(b) rights, but feels that the law is defective on all three branches of the proportionality test. Draft a law aimed at promoting this admittedly acceptable objective which would meet her objections, and hence, pass constitutional muster for all members of the court.

18. Would the following statement be sufficient to ground a prosecution under s.319(2)

WAKE UP CANADIANS! YOUR FUTURE IS AT STAKE!
Is it your tax dollars that subsidize the activities of the French minority of Essex County?

> Did you know that the Association of Canadian Français de l'Ontario has invested several hundreds of thousands of dollars of your tax money in Québec? And that they are still demanding $5 Million more of your tax dollars to build a French language high school? You are subsidizing separatists whether in Québec or in Essex County. Did you know that those of the French minority who support the building of the French language high school are in fact a subversive group and that most French Canadians of Essex County are opposed to the building of the school? Who will rid us of this subversive group if not ourselves? If we give them a school, what will they demand next... independent city states? Consider the ethnic problem of the United States and take heed. We must stamp out the subversive element which uses history to justify its freeloading on the taxpayers of Canada, now. The British solved this problem once before with the Acadians, what are we waiting for...?

See R. v. Buzzanga and Durocher (1979), 101 D.L.R. (3d) 488 (Ont. C.A.).

19. In Keegstra, the court holds that the impugned law meets s. 1's clarity requirement because it is capable of clarification through judicial interpretation. Is this reasoning sound? Does post hoc judicial interpretation of a criminal law provision assist an accused person after the fact in deciding whether his or her speech is legally permissible? Do such judicial interpretations assist a speaker who desists in public comments, for fear of possible prosecution?

20. Would it be constitutionally permissible to enact a civil statute giving individuals or groups the right to sue for damages, or simply for declaratory relief, if they feel themselves to be victimized by hate propaganda? Would the constitutional standards have to be the same for civil and criminal sanctions in this area?

21. One argument made at times against these hate propaganda laws is that they cause more harm than they remedy. It is argued that these trials give unprecedented publicity and notoriety to otherwise unknown purveyors of hate. Is this persuasive? Note that after Zundel's first conviction, a study of public opinion showed that for the most part, it did not generate adverse attitudes towards Jews. The exception, were greater adverse anti-Jewish attitudes were produced, involved persons who already disposed to dislike Jews.

22. Mr. Zunstra was fired from his job as a high school history teacher at More Science High School. He had devoted an entire lesson in his segment on Nazi Germany to teach that the Nazi Holocaust was a hoax, and that millions of Jews, Gypsies, political dissidents and others were not murdered by the Nazis. The Board of Education's letter of termination indicated that his Holocaust class did not conform to Board policy on curriculum and multiculturalism. Zunstra wishes to challenge the constitutionality of his termination. Has his freedom of expression been infringed? Should this dispute be litigated under s. 2(b) or s. 1 of the **Charter**, or both?

Notes and Questions

1. Unlike the provisions in various provincial Human Rights Codes, s.13(1) of the **Canadian Human Rights Act** does not provide a defence of truth. Should this be a fatal flaw?

2. Further, the language of s.13(1) is broader than the provision considered in the Keegstra case, supra, in that it covers any matter that is likely to expose a person or persons to hatred or "contempt." Do you think that this broader formulation is susceptible to the same type of justification accepted in Keegstra?

3. Note that in order to hear the message that the Western Guard had recorded, one had to voluntarily choose to call the telephone number. Thus, anyone who heard the message was clearly a voluntary as opposed to a captive audience. Is this a relevant factor?

4. As noted above, many of the provincial Human Rights Codes contain provisions similar to that considered in Taylor. For example, s.12 of the **Ontario Human Rights Code** provides as follows:

12. (1) A right under Part I is infringed by a person who publishes or displays before the public or causes a publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

(2) Subsection (1) shall not interfere with freedom of expression.

The Saskatchewan provision is even broader. It provides as follows:

14 (1) No person shall publish or display, or cause or permit to be published or displayed... any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of person or a group of persons because of his or their race, creed, religion, colour, sex, marital status... .

Are such provisions violations of s.2(b)? Are they justifiable pursuant to s.1?

5. In Singer v. Iwasyk and Pennywise Foods Limited (unreported, referred to in Tarnopolsky et al, Discrimination and the Law, 1985, p.10-4) the Respondent operated a drive-in restaurant called "Sambo's Pepper Pot" which displayed a sign showing a caricature of a small person, with black or brown skin colour, wearing a chef's hat and a grass skirt and bearing the words "Sambo's

Pepper Pot". Advertisements of the restaurant including mateh books and automobile stickers depicted the same caricature in association with the phrase "Jez Ain't None Better". The Commission concluded that the representation offended the "dignity and the right not to be so offcnded, of minority persons, especially of black or brown persons". The Respondents were therefore ordered to remove the caricature from the sign on the restaurant and to cease and desist from publishing the name, symbol or caricature of a "Sambo".

6. In McKinlay v. Cranfield and Dial Agencies (1980), 1 C.H.R.R. D-246 the Complainant, who was an epileptic, noticed a letter on display in the Respondent's window which was addressed to the Premier of the province, outlining problems with a tenant who was receiving social assistance and with the governmcnt department concerned. What the Complainant found objectionable was the following excerpt from the letter:

> ...I would highly reeommend the governmcnt of this provinee hire the handicapped; the situation could only improve if they hired mentally rctarded too. Or is this being done alrcady?

Although the Board aeeepted the Respondcnt's evidence that he honestly believed that the handicapped could do a better job than that being done by present employees of the Departmcnt of Social Services, the Board found that the average person "would in faet draw the conelusion that Mr. Cranfield rated the ability of the handicapped as something less than competent". The Board therefore ordered the offending sentenees to be deleted.

7. In Rasheed and Black United Front v. Bramhill (1980), 2 C.H.R.R. D-249 the Respondent wanted to eapitalize finaneially upon eertain statements made in the Nova Seotia House of Assembly by the Attorney-General to the effect that "there are too many people in Cape Breton like that, with a big mouth and with no mind", by ordering 5,000 buttons on which was depieted a picture of a black female singer, surrounded by the words "I'm a big-mouth Cape Bretoner -- so kiss me". It was held that such a statement might well tend to aetivate latent prejudice and indirectly affeet employment opportunity for blaeks. In upholding the complaint, the Commission eommented as follows with respect to freedom of expression:

> In particular cases, the right of free speech may have to give way to other human rights, such as the right not to be discriminated against, so that although the law infringes the right to freedom of speech, it does not inviolate it and it is, therefore, not unconstitutional.

8. All of these eases referred to above were deeided prior to the eoming into foree of the **Charter**. Would the results be any different today?

9. Does hate propaganda against a racial or religious group contravene their **Charter** s. 15 cquality rights? Do restrictions on hate propaganda promote the protection of equality rights? If a legislature were to repeal a statutory provision banning hate propaganda, would this constitute government action which causes or contributes to s. 15 violations eommitted against racial and religious minorities?

10. Comedians have on occasion made homosexuals the focus of derisive jokes and comments, with positive receptions from audiences sometimes resulting. Does such fall within the same focus as hate propaganda based on religion or race?

11. In a free and democratic society, which right is more important, equality or freedom of expression?

Ross v. New Brunswick School District No. 15 [1996] 1 S.C.R. 825

For several years, R, a teacher, publicly made racist and discriminatory comments against Jews during his off-duty time. R's writings and statements communicating his anti-Semitic views include four books or pamphlets, letters to a local newspaper, and a local television interview. A Jewish parent filed a complaint with the New Brunswick Human Rights Commission, alleging that the School Board, which employed R as a teacher, violated s. 5(1) of the Human Rights Act by discriminating against him and his children in the provision of accommodation, services or facilities on the basis of religion and ancestry. The Board of Inquiry (the "Board") found that R's off-duty comments denigrated the faith and belief of Jews. The Board further found that the School Board was in breach of s. 5(1), concluding that it discriminated by failing to discipline R meaningfully in that, by its almost indifferent response to the complaints and by continuing his employment, it endorsed his out-of-school activities and writings. The Board directed the School Board to comply with the following, in clause 2: (a) place R on a leave of absence without pay for a period of 18 months; (b) appoint him to a non-teaching position, if one became available during that period; (c) terminate his employment at the end of that period if, in the interim, he had not been offered and accepted a non-teaching position; and (d) terminate his employment with the School Board immediately if he published or wrote anti-Semitic materials or sold his previous publications any time during the leave of absence period or at any time during his employment in a non-teaching position. The Court of Queen's Bench allowed R's application for judicial review in part, ordering that clause 2(d) of the order be quashed on the ground that it was in excess of jurisdiction. The court also concluded that paragraph 2 of the order violated ss. 2(a) and 2(b) of the Canadian Charter of Rights and Freedoms but that, with the exception of clause 2(d), it could be saved by s. 1 of the Charter. The Court of Appeal dismissed the cross-appeals with respect to clause 2(d) and allowed R's appeal, holding that clauses 2(a), (b) and (c) of the order infringed R's freedom of expression and freedom of religion and could not be justified under s. 1.

Held: The appeal should be allowed and clauses 2(a), (b) and (c) of the order restored. ...

(2) Discrimination

(3) Proportionality Between Effects of Order and Objective

[para108] The deleterious effects of clauses 2(a), (b) and (c) of the order upon the respondent's freedom of expression and freedom of religion are limited to the extent necessary to the attainment of their purpose. The respondent is free to exercise his fundamental freedoms in a manner unrestricted by this order, upon leaving his teaching position. These clauses only restrict the respondent's freedoms to the extent that they prohibit the respondent from teaching, based upon the exercise of his freedom of expression and freedom of religion. The respondent is not prevented from holding a position within the School Board if a non-teaching position becomes available; furthermore, he is to be offered a non-teaching position if it becomes available on terms and at a salary consistent with the position. In my view, the objectives of preventing and remedying the discrimination in the provision of educational services to the public outweigh any negative effects on the respondent produced by these clauses.

[para109] Given my conclusion that clause 2(d) fails the minimal impairment branch of the s. 1 analysis, it is unnecessary for me to consider it in relation to the proportionality branch. My conclusion, with respect to s. 1, is that clauses 2(a), (b) and (c) of the order are a justified infringement upon the freedom of expression and the freedom of religion of the respondent.

[para110] With respect to clause 2(d) of the order, this is an appropriate case in which to apply severance. ... Thus, clause 2(d) will be severed from the remainder of the order on the basis that it does not constitute a justifiable infringement of the Charter and is therefore in excess of the Board's jurisdiction.

Notes and Questions

1. The Court is unanymous here. Are the justices who dissented in the Keegstra and Taylor/Western Guard cases being doctrinally consistent when they vote for the majority here? Are there material differences between those cases and this one?

2. Do you agree that the Court was correct in upholding the portions of the human rights oder which it sustained? Was the Court correct in invalidating the portions of the order which it struck down? What is the constitutional difference between the two?

3. How does this case's approach to the relationship between free expression and equality square with its approach to these values in the Gould v. Yukon Order of Pioneers case?

4. Both Ross and Keegstra were public school teachers. Would or should the outcome in either case be constitutionally different if they were university professors? Graduate school professors? Law school teachers?

...(Regarding proportionality) At this stage in the s. 1 analysis, there must be an assessment of the importance of the state objective balanced against the effect of limits imposed upon the freedom. As previously noted, the "expression" at stake in the present case is inimical to the values underlying freedom of expression.

The type of falsehoods caught by this section serves only to hinder and detract from democratic debate. The impugned provision, s. 181, is narrowly defined in order to minimally impair s. 2(b). In sum, the prohibition of the wilful publication of what are known to be deliberate lies is proportional to the importance of protecting the public interest in preventing the harms caused by false speech and thereby promoting racial and social tolerance in a multicultural democracy.

At the end of this detailed analysis it is worthwhile to step back and consider what it is that is being placed on the balance.

On one side is s. 181. It infringes to a minimal extent the s. 2(b) right to freedom of expression. In reality, it cannot be said that the prohibition of the wilful publication of false statements that are known to be false is an infringement of the core values of s. 2(b). Rather the infringement is on the extreme periphery of those values. In addition, the section can play an important role in fostering multiculturalism and racial and religious tolerance by demonstrating Canadian society's abhorrence of spreading what are known to be lies that injure and denigrate vulnerable minority groups and individuals.

On the other side, s. 181 provides maximum protection of the accused. It requires the Crown to establish beyond a reasonable doubt that the accused wilfully published false statements of fact presented as truth and that their publication caused or was likely to cause injury to the public interest. Any uncertainty as to the nature of the speech must inure to the benefit of the accused. If ever s. 1 balancing is to be used to demonstrate that a section of the Criminal Code is justifiable in a free and democratic society, this is such a case.

(Numerous citations omitted.)

Notes and Questions

1. Is the majority approach in Zundel consistent with the majority approach in Keegstra?

2. Is the majority approach in Zundel inconsistent with the dissenting approach in Keegstra?

3. Is the majority treatment of the "shifting aims" issue under s. 1 in Zundel consistent with the majority approach to that issue in the Butler obscenity case in the next chapter, dealing with

anti-pornography legislation?

4. Should Charter s. 2(b) protect utterances which are proven to be known by the speaker to be false, beyond a reasonable doubt? See the excerpts from this case on s. 2(b) in Chapter 10. In particular, do you agree with the majority view that deliberate lies can serve s. 2(b) aims?

5. Compare the ruling on the vagueness of the impugned law by these two opinions with Butler infra in Chapter 10.

6. Can you account for each of these opinion's accusation that the other opinion has fundamentally departed from proper Charter analysis?

7. McLachlin, J. states: " Neither the admittedly offensive beliefs of the appellant, Mr. Zundel, nor the specific publication with regard to which he was charged under s.181 are directly engaged by these constitutional questions. This appeal is not about the dissemination of hate, which was the focus of this Court's decision in R. v. Keegstra..." Do you agree? Is it appropriate for the constitutional question to be considered in a manner divorced from the facts giving rise to the Charter challenge? Is it appropriate for the dissent to focus so extensively on the details of Zundel's particular publication? What impact does this have on the majority and dissenting opinions' analysis?

8. McLachlin, J. expresses several concerns about the capacity of a jury to properly resolve issues assigned to it under s. 181. Do juries confront these kinds of problems in other kinds of criminal cases? If so, is the court questioning the jury process itself, or something peculiar about the function of the jury under this provision?

9. In its s. 1 discussion, the majority states: "Moreover, it is significant that the Crown could point to no other free and democratic country which finds it necessary to have a law such as s. 181 on its criminal books." Canadian courts sometimes take into account this consideration in their s. 1 analysis. Of what relevance should this consideration be in the s. 1 deliberation? Why?

10. The majority criticizes the dissent for its effort at construing the impugned provision before applying Charter analysis to it. Compare the court's efforts at statutory construction as a precursor to Charter analysis in Keegstra and in Butler in the next chapter. Is there something qualitatively different in what the dissent here tries to do? If so, where is the line between appropriate -preCharter statutory construction on the one hand, and what the dissent here did, on the other? If there is no qualitative difference between what the dissent did here, and what the court did in those other cases, is the majority here justified in its critique of the dissent in Zundel?

11. The dissent takes up the majority's suggestion that history has many lessons to teach, and

then states: "One is that the marketplace of ideas is an inadequate model". What implications does this proposition have for s. 2(b) theory and analysis? Does it square with the underlying philosophical foundation for the court's s. 2(b) approach originating in Ford and Irwin Toy? Compare the approach of Cory, J. in other s. 2(b) contexts, such as in his views on the Charter rights of news outlets to report on court proceedings, in Edmonton Journal v. A.G. Alberta, infra, Chapter 20. See also the remark of Dickson, C.J.C. in Keegstra supra that "neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas."

12. Examine the analysis in both the dissent and majority opinions in both Keegstra and Zundel in connection with the s. 1 minimal impairment and residual proportionality criteria. What differences, if any, are there between the court's inquiry under each of these criteria? What, if anything, does one add to the other?

CHAPTER 12

THE EVOLVING AMERICAN APPROACH TO HATE PROPAGANDA LAWS

The Canadian cases on hate speech, discussed in the preceeding chapter, refer on a number of occasions to U.S. authority, either to agree or disagree with it. On other occasions, ideas are reflected in the canadian decisions whose roots are American, though no reference to their origin is made. It is therefore informative to consider in some detail the manner in which U.S. courts have dealt with First Amendment challenges to laws which seek to limit hate propaganda.

The American position on hate speech has changed drastically. It began by being very tolerant of laws restricting such expression. Now, it is open to question whether any law, restricting such expression, could survive First Amendment scrutiny.

In reviewing the following U.S. decisions, consider how they are similar to or different from the Canadian jurisprudence. Also, note the change in the treatment of this issue in recent years.

The Early Approach

Beauharnais v. Illinois, 343 U.S. 250 (1952)

[The petitioner was convicted of violating [s.] 224a of the Illinois Criminal Code, which prohibited any publication or exhibition that portrayed depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.]

Frankfurter, J.:

... [Beauharnais's] leaflet [set] forth a petition calling on the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighbourhoods and persons, by the Negro..." Below was a call for "One million self respecting white people in Chicago to unite..." with the statement added that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions,...rapes, robberies, knives, guns and marijuana of the negro, surely will." This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc. ...

The Illinois Supreme Court tells us that [s.] 224a "is a form of criminal libel law."... [T]he Supreme Court's characterization of the words prohibited by the statute as those "liable to cause

Notes and Questions

1. Frankfurter J. analogizes the Illinois law in question to that of criminal libel, arguing that statements aimed at individuals may be criminally punished and that similar principles ought to apply to statements aimed at defaming groups. Are there principled distinctions that can be drawn between statements aimed at individuals and statements aimed at groups? If such distinctions are made, can a skilful speaker fashion his or her statements to target only groups, and so, avoid legal sanction?

2. Douglas J. and Jackson J. argue that the law can only be justified if it is limited to situations in which the publications create a "clear and present danger" of breaches of the peace or injury to persons or groups. Is this an appropriate test? What are the difficulties inherent in such an approach? What evidence must be adduced to meet this clear and present danger test?

3. In Garrison v. Louisiana, 379 U.S. 64 (1964), the Supreme Court appeared to modify its position and found that some libelous statements that were caught got by state criminal libel statutes did indeed come within the realm of constitutionally protected free speech. As a result of that decision, some American writers considered that the Beauharnais decision had been placed in serious doubt. E.T. Markus, "Group Defamation And Individual Actions: A New Look At An Old Rule" (1983), 71 Cal. L. Rev. 1532 at p. 1547:

> [C]riminal defamation laws are virtually non-existent in modern criminal codes. But even if such statutes exist and are constitutional, no group libel is actionable under them unless it presents a "clear and present danger" of causing violence. It is thus evident that if criminal actions for group defamation can be maintained at all, it will only be permitted under a very limited set of circumstances.

Further doubt was cast on the principle set out in Beauharnais by the Supreme Court in New York Times v. Sullivan, supra. More recently the Supreme Court refused to review the Seventh Circuit's decision in the Skokie cases (Smith v. Collin, 439 U.S. 916). Justice Blackmun, joined by Justice White, dissented, and urged that certiorari be granted "in order to resolve any possible conflict that may exist between the rulings of the Seventh Circuit here and Beauharnais."

The Current Approach Develops

Village of Skokie v. National Socialist Party of America, 366 N.E. (2d) 436 (1977) (Ill. App. Ct.)

Per Curiam:

Plaintiff, village of Skokie, filed a complaint in the circuit court of Cook County on April

listen.

As to those who happen to be in a position to be involuntarily confronted with the swastika, the following observations from Erznoznik v. City of Jacksonville (1975), 422 U.S. 205, are appropriate:

> The plain, if at all times disquieting, truth is that in our pluralistic socicty, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' Rowan v. Post Office Dept., [397 U.S. 728,]... . Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above [home intrusion or captive audience], the burden normally falls upon the viewer to 'avoid further bombardment of [his] eyes. ' Cohen v. California [403 U. S. 15, 21].

Thus by placing the burden upon the viewer to avoid further bombardment, the Supreme Court has permitted speakers to justify the initial intrusion into the citizen's sensibilities.

We accordingly, albeit reluctantly, conclude that the display of the swastika cannot be enjoined under the fighting-words exception to free speech, nor can anticipation of a hostile audience justify the prior restraint. Furthermore, Cohen and Erznoznik direct the citizens of Skokie that it is their burden to avoid the offensive symbol if they can do so without unreasonable inconvenience. Accordingly, we are constrained to reverse that part of the appellate court judgment enjoining the display of the swastika.

[Clark, J. dissented.]

Notes and Questions

1. The Skokie cases make clear that, subject to the "fighting words" exception of Chaplinsky, the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the listeners. (see Bachellar v. Maryland (1970), 397 U.S. 564, 567). This so-called "hecklers' veto" was also rejected by Kerans J.A. in Keegstra. To what extent should this doctrine permit groups to demonstrate in a forum or locality where their ideas will be particularly offensive? Should the availability of alternative forums where the ideas would be less offensive be a factor? Is there a principled way to distinguish between the demonstrations in Skokie and those by civil rights activists in the late 50's and early 60's in the deep South?

2. The Supreme Court of Illinois also rejected the argument that the people of Skokie were a "captive audience". The Court noted that there had been advance notice by the demonstrators, and thus those to whom the message was offensive could simply not attend the demonstration.

Would this then permit demonstration in public parks but preclude demonstration in residential areas? What about individuals who for reasons of employment or otherwise have to be in the public park area during the demonstration?

3. The Supreme Court's ultimate decision rested in part on a view that at least in the specific circumstances of this case, the privacy interests of listeners must give way to the speech rights of the proposed speakers. Should this value judgement be followed in Canada? Note that in Edmonton Journal v. A.G. Alberta (1989), 64 D.L.R. (4th) 577, the Supreme Court of Canada held that protection of individual privacy is a pressing and substantial societal objective whose pursuit can justify limits on s. 2(b) rights.

4. These decisions refer to the U.S. prior restraint doctrine. what is a prior restraint? Should we treat it differently than
other forms of speech restriction?

The Current Approach Applied to Anti-discrimination Initiatives

Doe v. University of Michigan, 721 F. Supp. 852 (1989) (E.D. Mich.)

Cohn, District Judge:

It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values. Recently, the University of Michigan at Ann Arbor,...a state-chartered university,...adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment...in an attempt to curb what the University's governing Board of Regents...viewed as a rising tide of racial intolerance and harassment on campus. The Policy prohibited individuals, under the penalty of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. However laudable or appropriate an effort this may have been, the Court found that the Policy swept within its scope a significant amount of "verbal conduct" or "verbal behavior" which is unquestionably protected speech under the First Amendment. Accordingly, the Court granted plaintiff John Doe's (Doe) prayer for a permanent injunction as to those parts of the Policy restricting speech activity, but denied the injunction as to the Policy's regulation of physical conduct. The reasons follow.

II. Facts Generally

According to the University, in the last three years incidents of racism and racial

if speech

> exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.

This observation appears as compelling today as when it was first written over one hundred and twenty years ago. ...

Notes and Questions

1. In this case, the Court holds that the University of Michigan's policy was overbroad as it swept within its scope a significant amount of speech which was unquestionably protected under the First Amendment. As well, the Court held that the terms of the policy were so vague that its enforcement was also unconstitutional. Would the provincial human rights codes considered earlier satisfy these tests? Why was the defence of truth not considered in this case?

2. Professor Philip Rushton, a psychology professor who has taught at the University of Western Ontario, has developed a theory which divides humans into three categories: orientals, caucasians, and blacks. He suggests that orientals having the largest cranial capacity on average, are therefore more intelligent on average than whites, who in turn have greater cranial capacities on average than blacks. Should a complaint against Rushton relying upon the provisions of the Ontario Human Rights Code succeed? Why or why not?

3. At one point, the University of Western Ontario determined that Professor Rushton would not be permitted to give his lectures in person. Rather, he would be required to videotape his lectures and students would be permitted to sign the tapes out. Assuming that the University is a state actor, would Professor Rushton have any claim under s.2(b) against such action? Would any students have s . 2(b) claims on the basis that they wish to receive the information from him, and are limited in their ability to do so by this requirement? What if many students want to view the video, and there are not enough copies to go around?

4. Assume that an organization of university students have discovered that the university library contains a book in its "history" section which purports to document that the Nazi extermination of six million Jews was a hoax. The organization demands that this book either be removed from the library altogether, or that at the very least, that it be kept behind the counter. In any event, the group demands that the book be taken out of the History section, and put in its proper place, being the Fiction section of the library.

(a) What should the university administration do?

(b) Assuming that the university is entirely private, except for government per student subsidies,

what can the university do?

(c) Assuming instead that the university is entirely funded by the province, and its administration is provincially appointed, what can the university do?

The Current Approach and the Disintegration of First Amendment Analysis B

R. A. V. v. ST. PAUL 112 S. Ct. 2538; 1992

After allegedly burning a cross on a black family's lawn, petitioner R. A. V. was charged under, inter alia, the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, which prohibits the display of a symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The trial court dismissed this charge on the ground that the ordinance was substantially overbroad and impermissibly content-based, but the State Supreme Court reversed. It rejected the overbreadth claim because the phrase arouses anger, alarm or resentment in others" had been construed in earlier state cases to limit the ordinance's reach to fighting words" within the meaning of this Court's decision in Chaplinsky v. New Hampshire, 315 U.S. 568, 572, a category of expression unprotected by the First Amendment. The court also concluded that the ordinance was not impermissibly content-based because it was narrowly tailored to serve a compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.

Held: The ordinance is facially invalid under the First Amendment.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and THOMAS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN and O'CONNOR, JJ., joined, and in which STEVENS, J., joined except as to Part I - A. BLACKMUN, J., filed an opinion concurring in the judgment. STEVENS, J., filed an opinion concurring in the judgment, in Part I of which WHITE and BLACKMUN, JJ., joined.

JUSTICE SCALIA delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely-made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, which provides:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race,

scarcely offends the First Amendment.

In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it.

Notes and Questions

1. Compare this decision with Zundel and Keegstra. Consider particularly the differing approaches to the constitutional power of the state to disapprove certain viewpoints or ideas.

2. Is there a way that the impugned law could have been redrafted to catch the conduct giving rise to the charge, while surviving the analysis of the Scalia opinion?

3. What is the difference between content discrimination and viewpoint discrimination?

4. Consider particularly Scalia's view that "One must wholeheartedly agree with the Minnesota Supreme Court that "it is the responsibility, even the obligation, of diverse communities to confront such notions (i.e. race hatred, etc.) in whatever form they appear," ibid., but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority.". The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."

How would such analysis fit into our Supreme Court's approaches to hate propaganda and pornography?

5. How would this law do under the Irwin Toy analysis? Does cross burning convey a message? Is the law's purpose or effect to abridge expression?

6. Is the majority correct that content is here being regulated and not the "mode" of expression? Is the court's reference to Modes of expression the same as our courts' use of the term "form" of expression?

7. Do Scalia, J. or other justices depart from the traditional U.S. categorical approach to protected and unprotected speech or do they simply adopt a purposive approach to its constitutionally-permissible regulation? Would the majority's approach make sense in Canada under s. 1 when dealing with categories of less socially valued speech, even if such speech is protected by s. 2(b)?

8. Traditionally, content-based speech regulation is considered taboo in the U.S, or so some judges would have us seem. Which opinion in this case more accurately characterizes the status of content-based regulation under the First Amendment?

CHAPTER 13

OBSCENITY AND PRONOGRAPHY

1. INTRODUCTION

The question presented in this chapter is whether and to what extent federal or provincial laws may be used to regulate or prohibit speech, films, books, plays videos, music or other forms of communication on the ground that their content is obscene or pornographic. To the extent that the **Charter** allows for laws regulating such materials, the legislative jurisdiction to do so is divided between the federal and provincial governments. The federal parliament has jurisdiction over criminal law, regulation of the broadcast media, and international trade. Provincial legislatures have jurisdiction over property and civil rights in the province, including the regulation of economic activity within the province. This jurisdiction is in turn delegated to some extent to municipalities, whose bylaws often regulate the time, place and substance of commercial transactions within their territorial limits.

The regulation of obscenity and pornography can take many forms. The possession, use, sale, or public exhibition of such materials can be criminalized. Regulatory tribunals such as film censor boards can be empowered to vet films for public exhibition, and can ban or censor such films. Municipal bylaws can limit the regions or zones where obscene or pornographic materials can be sold, or performances can be conducted. Such bylaws can also establish licensing regimes, which govern the content, time and place of the purveyance of such materials. Broadcasting regulatory bodies can establish standards for the content of publicly-broadcasting of such materials, and can make compliance with such standards a condition of licensure. Federal importing regulations can place taxes on the import of pornography, and/or can ban the importation of such materials to Canada.

Before the **Charter** was enacted, there were limited constitutional constraints on the regulation of obscenity or pornography. when the Nova Scotia Board of Censors banned the film "Last Tango in Paris", the Supreme Court of Canada held that this is intra vires the provincial legislature, despite claims that such was a provincial attempt to pass criminal laws. (See Re Nova Scotia Board of Censors and McNeil, [1978] 2 S.C.R. 662). Various municipal bylaws have been challenged on administrative law grounds where they regulate the sale of pornography, though such challenges are governed by domestic common law doctrine.

The challenges to such regulation, when based on freedom of expression claims, rest on the assertion that these regulations are clear examples of content-based regulations of speech or expression. Different arguments have been advanced in defence of these restrictions. Of these, the different rationalia for regulation of these materials tend to justify different definitions of obscenity or pornography.

The key questions presented in this area under the **Charter** include the following:

(1) How should "obscenity" or "pornography" be defined for constitutional purposes?

(2) Is obscenity or pornography protected expression, under **Charter** s. 2(b)?

(3) If so, what kinds of regulations with respect to pornography or obscenity would infringe the freedom of expression, hence requiring justification under **Charter** s. 1?

(4) If some or all regulations on obscenity or pornography violate **Charter** s. 2(b), to what extent are they justifiable under **Charter** s. 1?

2. THE CANADIAN APPROACH

Several lower courts had grappled with the constitutionality of obscenity laws during the Charter's earliest years. These laws were generally upheld. It was not until the Supreme Court had already ruled on the constitutionality of federal hate propaganda provisions that it turned its attention to the Criminal Code's anti-pornography provisions in the Butler case.

R. v. Butler, [1992] 1 S.C.R. 452

(Lamer, C.J., La Forest, Sopinka, Cory, McLachlin, Stevenson, Iacobucci, JJ. allow the appeal. L'Heureux-Dube, Gonthier, JJ. dissenting in part.)

The accused owned a shop selling and renting "hard core" videotapes and magazines as well as sexual paraphernalia. He was charged with various counts of selling obscene material, possessing obscene material for the purpose of distribution or sale, and exposing obscene material to public view, contrary to s. 159 (now 163) of the Criminal Code. Section 163(8) of the Code provides that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of ... crime, horror, cruelty and violence, shall be deemed to be obscene". The Supreme Court of Canada held that the Crown's appeal should be allowed and a new trial directed on all charges.

The judgment of Lamer C.J. and Sopinka, La Forest, Cory, McLachlin, Stevenson and Iacobucci JJ. was delivered by SOPINKA J.:

This appeal calls into question the constitutionality of the obscenity provisions of the Criminal Code, s. 163. They are attacked on the ground that they contravene s. 2(b) of the Canadian Charter of Rights and Freedoms. ...Criminal Code, s. 163. (1) Everyone commits an offence who,

I also agree with Sopinka J.'s analysis of the proportionality between the restriction effected by s. 163 of the Code and its objectives. I would add a remark, however, on the first factor listed by Sopinka J. under the minimal impairment branch of the proportionality test, that is the exception for materials of the third category. Contrary to Sopinka J., I consider that the third category may sometimes attract criminal liability. The requirement that the impugned materials exceed the community standard of tolerance of harm provides sufficient precision and protection for those whose activities are at stake. This is so as, on the one hand, the field of sexual exploitation is one of first apprehension, directly related to one of the primary aspects of human personality, and well known to all, including particularly those engaged in it. On the other hand, the criterion of tolerance of harm by the community as a whole is one that, by definition, reflects the general level of tolerance throughout all sectors of the community, hence generally of all its members. It is therefore a very demanding criterion to meet as it must be by definition generally known or apprehended. It is indeed not far removed from the domain of public notoriety and, inasmuch as it falls within it, may be the subject of judicial notice not requiring specific proof. ...

Notes and Questions

1. In Ontario Film and Video Appreciation Society v. Ontario Board of Censors (1983), 147 D.L.R. (3d) 58, the Divisional Court of Ontario struck down Ontario's **Theatre Act**, which empowered a provincial censor board to approve films for public exhibition, and to require them to be censored before being shown publicly if the board so desired. This was one of the earliest invalidations of legislation under the **Charter**, during its earliest years when lower courts were reticent to forcefully apply the **Charter** in advance of leadership from the Supreme Court of Canada. The impugned statute provided the board with no criteria to govern this essentially unfettered censorial discretion. The statute did not entitle a party to make submissions to the board in person and to attend its sessions during which the party's film was considered for approval for public exhibition. The court held in material part as follows:

> These fundamental freedoms guaranteed in the Charter are not absolute. The Charter recognizes that it is sometimes necessary to restrict freedom of expression to an extent to protect the interest of society. Consequently, it is possible for our governments to circumscribe the freedoms enunciated in s. 2. ...
>
> We are all of the view that ss. 3(2)(a) and (b), 35 and 38 impose a limitation on the freedom of expression of the applicant as guaranteed by s. 2(b) of the Charter. It is clear to us that all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film, are equally protected by the Charter. The burden, therefore, falls upon the Attorney-General to satisfy us on the balance of probabilities that the requirements of s. 1 of the Charter have been met...
>
> As for being demonstrably justifiable in a free and democratic society, it has been held

that there must be a reasonable ground upon which a limitation can be based for it to be "justifiable"... It is obvious that the **Theatres Act**...primarily seeks, among other things, to prevent socially offensive films from being publicly shown in Ontario. Eight other provinces and many other free and democratic countries have similar legislation... Moreover, the Federal criminal prohibition against obscenity is evidence that there is and has been sufficient concern in this country about this problem to enact legislation to combat it. We are satisfied, therefore, that some prior censorship of film is demonstrably justifiable in a free and democratic society. ...

The next issue to consider is whether the limits placed on the freedom of expression by the **Theatres Act** are reasonable ones. Counsel for the Crown argued that the limits are reasonable since they curtail only the freedom of those who wish to exhibit films to the public for gain. ... It would be fair to assume that the prime purpose of making films is to exhibit them to the public. If a film-maker cannot show his film to the public there is little point in making it. Moreover, the profit motive cannot be a valid reason to prevent a film-maker from showing his work, for one who shows film for profit can have no less freedom of expression than one who does so not for profit. The extent of freedom of expression cannot depend on that, for there is nothing wrong with making a profit from one's art or one's ideas. In addition, freedom of expression extends to those who wish to express someone else's ideas or show someone else's film. It also extends to the listener and to the viewer, whose freedom to receive communication is included in the guaranteed right.

Another argument advanced by the Crown is that a prohibition can be reasonable if it applies only to film-makers, not to authors of books, publishers of papers, performers on the stage, T.V. producers, etc. We cannot agree. The Charter, in allowing reasonable limits, does not countenance the total eradication of freedom of expression for those who use a particular form of expression such as film. ...

As to whether the standards issued by the board of censors would be considered to be reasonable limits, we express no views. They may or may not be acceptable, but in the light of the position we take on the next issue, it is not necessary for us to express a view. ...

The next issue is whether the limits placed on the applicant's freedom of expression by the board of censors were "prescribed by law". It is clear that statutory law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force. This is to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years. This requirement underscores the seriousness with which courts will view any interference with the fundamental freedoms. ...

There are no reasonable limits contained in the statute or the regulations. The standards

> and the pamphlets utilized by the Ontario Board of Censors do contain certain information upon which a film-maker may get some indication of how his film will be judged. However, the board is not bound by these standards. They have no legislative or legal force of any kind. Hence, since they do not qualify as law, they cannot be employed so as to justify any limitation on expression, pursuant to s. 1 of the Charter. ...
>
> This does not mean that the censorship scheme set out in the **Theatres Act** is invalid. Clearly the classification scheme by itself does not offend the Charter. Nor do we find that ss. 3, 35 and 38 are invalid, but the problem is that standing alone they cannot be used to censor or prohibit the exhibition of films because they are so general, and because the detailed criteria employed in the process are not prescribed by law. These sections, in so far as they purport to prohibit or to allow censorship of films, may be said to be "of no force or effect", but they may be rendered operable by the passage of regulations pursuant to the legislative authority or by the enactment of statutory amendments, imposing reasonable limits and standards. [at 64-8].

2. The Ontario Government's appeal to the Ontario Court of Appeal was unanimously dismissed (Re Ontario Film and Video Appreciation Society & Ontario Board of Censors (1984), 5 D.L.R. (4th) 766). The Court of Appeal held in material part as follows:

> We agree with the conclusion of the Divisional Court that s. 3(2)(a) clearly imposes a limitation on freedom of expression as guaranteed by s. 2(b) of the Charter. ... The Divisional Court concluded on this point...:
>
> These sections, in so far as they purport to prohibit or to allow the censorship of films, may be said to be "of no force or effect"...
>
> We would go further than the Divisional Court on this issue. In our view, s. 3(2)(a), rather than being of "no force or effect", is ultra vires as it stands. the subsection allows for the complete denial or prohibition of the freedom of expression in this particular area and sets no limits on the Ontario Board of Censors. It clearly sets no limit, reasonable or otherwise, on which an argument can be mounted that it falls within the saving words of s. 1 of the Charter: "subject only to such reasonable limits prescribed by law". Further, like the Divisional court, we conclude that s. 3(2)(b) and ss. 35 and 38 cannot be interpreted and applied in their present form to support the censorship of film although they gave a valid role to play otherwise. As pointed out by the Divisional Court, there is no challenge in these proceedings to the system of film classification, nor to the general regulation of theatres and projectionists and other matters dealt with in the statute and regulations. [at 767].

3. In R. v. Videoflicks et al. (1984), 14 D.L.R. (4th) 10, the Ontario Court of Appeal first considered a **Charter** challenge to Sunday closing legislation. This is the case which went on to the Supreme Court of Canada under the name of Edwards Books and Art, Ltd. v. R., [1986] 2

S.C.R. 713. In the Court of Appeal, one appellant, Videoflicks, a video rental chain, argued in addition to a freedom of religion claim that Sunday closing legislation, as applied to video rental stores, violates **Charter** s. 2(b). The Court of Appeal held that rental services were not covered by the impugned Sunday closing law. Thus, Videoflicks' appeal could be granted without need to resort to the **Charter**. However, the court went on to say the following about the s. 2(b) claim:

> Counsel for the Attorney-General makes clear that the central question is whether the regulation of sales or rental s through prohibitions of such on the holidays named in the Act really amounts to a limit on freedom of expression. To answer in the affirmative, she argues, would effectively prohibit the government from adopting any type of regulation in this area since all regulation implies restriction. I agree. Under the Act, there is no regulation of content which, in the absence of justification under s. 1 of the Charter, would constitute contravention of s. 2 thereof... . Nor is there a restriction on who can produce, distribute, sell or rent video tapes. Similarly, the Act does not impose restrictions on who may view or hear them, nor where or when. In fact, the tapes may be viewed or listened to even on the holidays named in the Act. In short, there is not such a regulation of time as to sales or rentals as to amount to a serious interference with access to these tapes. I would agree with the analogy of the use of video tapes with the watching of television or the seeing and hearing of movies in a cinema. However, television sales and rentals are regulated as to time and cinemas are regulated as to time and place. For a whole number of public policy reasons of health or noise abatement or hours of rest, entertainment is regulated as to time and place. One may not be able to buy or rent books or records or attend public entertainment at just any time. Mere regulation at to time and place, however, cannot be considered an infringement of freedom of expression, unless there is evidence that such regulation in intent or effect adversely impacts upon content or adversely interferes with production, availability and use or determines who can be involved in these. No such evidence was provided in this case. [at 46-7].

4. Do the holdings in Videoflicks and Ontario Film and Video Appreciation Society, supra comply with the subsequently articulated approach to freedom of expression set out by the Supreme Court of Canada in ford and Irwin Toy, supra?

5. In light of the Videoflicks and Ontario Film and Video Appreciation Society holdings, what is the constitutional position of legislation authorizing the censorship or prohibition of the sale or rental of pornographic materials? If Ontario's film censor board legislation provided specific censorial criteria, pertaining to pornography, would this meet the requirements of these two cases? Draft a provision to include in a film censorship statute which would meet these requirements. Does the inclusion of such criteria into a provincial film censorship statute transform it into a provincial effort at enacting criminal law, thus being ultra vires the province?

6. Critics of sex stereotyping in the media contend that T.V. drama and news programs often

portray women in unfair and inaccurate stereotypical ways. This is said to contribute to pervasive public stereotyping of women which contributes to their inequality of opportunity in society. Is such harm within the reach of the Butler "harm" doctrine? Does the harm have to relate to sex and/or sexual violence before the Butler "harm" doctrine is available? Is the "harm" of conventional sex stereotypes in conventional non-pornographic T.V. programming more or less pervasive than that in films which were the target of the legislation impugned in Butler? Do these T.V. images create a greater or lesser barrier for women to full and equal participation in society?

7. Following upon the preceding note, T.V. programming is also criticized as stereotyping persons with disabilities. Persons with an alleged mental illness or disorder are disproportionately shown on television and in movies as violent and dangerous. Persons with physical disabilities are portrayed either as pitifully dependent and incapacitated, or as superstars and extreme achievers. Rarely is a disabled person seen as simply part of the mainstream of society. Critics contend that these images contribute to omnipresent negative public attitudes towards persons with disabilities, and that such attitudes constitute the greatest barrier to the full participation of disabled persons in society. Should this be captured by the "harm" concept in Butler? Would your answer be influenced by evidence that employable-aged disabled persons in Canada experience unemployment rates estimated to be in the range of 70% to 80%, and that this is commonly attributed to stereotypical public attitudes which link disability with inability?

8. What are the outer limits of the Butler "harm" concept? Can the state ban any message consistent with charter s. 1 simply by proving that the message can lead to some kind of harm to others? How many persons must be the target of this harm before s. 1 would come into play?

9. As a matter of conventional criminal law, an accused cannot be convicted of a crime unless he or she both committed the actus reus and had the requisite criminal intent or mens rea. With the **Charter**, a mens rea requirement has assumed a degree of constitutional requirement (See e.g. Reference re. S. 94(2) B.C. Motor Vehicle Act, 1985] 2 S.C.R. 486; R. v. Vaillancourt, [1987] 2 S.C.R. 636). What mental element should the **Charter** require before a person can be criminally convicted of offences related to obscene materials? Does **Charter** s. 2(b) have any impact on this question? See Smith v. California, 80 S.Ct. 215 (1959) where the U.S. Supreme Court held that the First Amendment imposes a heightened mens rea requirement for criminal convictions respecting possession of obscene materials. The court held:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfils its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: "Every bookseller would be placed under an obligation to make himself

> aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." The King v. Ewart, 25 N.Z.L.R. 709, 729 (C.A.). And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded. [at 218-9].

10. Is there any difference between obscene books, still pictures, films, videos and television broadcasts from the perspective of **Charter** s. 2(b)? From the perspective of protecting women from violence, degradation and/or stereotyping? From the perspective of **Charter** s. 1?

11. Assume that a statute provided that no person may be depicted in a video or film, in any scene involving sexual acts, unless that person has freely consented thereto in writing. Assume that it further provides that no person under the age of 18 shall be deemed to have capacity to consent thereto. Would this be constitutional? Would it make a difference if the age limit was 16? 14?

12. In Roth, infra the U.S. Supreme Court suggested that the First Amendment does not protect matters which are utterly without redeeming social importance. As an alternative to Butler, should Canada adopt such a test, and exclude obscenity from s. 2(b)'s reach? Under this test, does the First Amendment protect a film which graphically depicts undisputedly perverse sexual activity, interspersed with discussions between the sexual players on subjects of racial equality, the importance of integration in the schools, and the protection of minorities' rights in society?

13. To support his Butler s.1 finding in favour of the legislation, has Sopinka, J. made any modifications to the s. 1 test?

14. How do the two Butler opinions differ on the true aims of obscenity laws? How do these differences manifest themselves in the Charter analysis?

15. Do the Butler opinions provide an acceptable response to the vagueness attacks on the impugned provision?

15. Is Sopinka, J.'s majority ruling in Butler consistent with his decision to dissent in the hate propaganda cases?

necessary to achieve its salutary objectives. Child pornography is produced in private, and child pornography is used privately to entice children into sexual activity. Thus, the privacy interest restricted by the law is closely related to the specific harmful effects of child pornography.

241] In examining the law's effect on privacy interests, it is important not to lose sight of the beneficial effects of the provision in protecting the privacy interests of children. When children are depicted in pornographic representations, the camera captures their abuse and creates a permanent record of it. This constitutes an extreme violation of their privacy interests. By criminalizing the possession of such materials, Parliament has created an incentive to destroy those pornographic representations which already exist. In our view, this beneficial effect on the privacy interests of children is proportional to the detrimental effects on the privacy of those who possess child pornography.

242] When the effects of the provision are examined in their overall context, the benefits of the legislation far outweigh any harms to freedom of expression and the interests of privacy. The legislation hinders the self-fulfilment of a few, but this form of self-fulfilment is at a base and prurient level. Those who possess child pornography are self-fulfilled to the detriment of the rights of all children. The prohibition of the possession of such materials is thus consistent with our Charter values. It fosters and supports the dignity of children and sends the message that they are to be accorded equal respect with other members of the community....

Notes and Questions

1. Is the Court applying the same rational connection test here as it did in Butler? Would the Butler legislation survive the rational connection test which the majority applies here?

2. Is the Court's remedy here of "reading in" an exemption for certain materials consistent with its general approach to Charter remedies? Is it consistent with the Court's general reluctance to grant constitutional examptions? Is what the Court did here akin to judicial legislation? If so, is there anything wrong with that?

3. To what extent does the Court's exemption from the legislation provide an avenue to circumvent the legislation's goals?

4. When is the state justified in restricting speech on account of its content for the core goal of regulating our attitudes?

5. Is the Court's use of legislative history to predict what the Parlimament intended or might intend convincing? Should Parliamentary transcripts be used in this way?

6. The plurality expresses regret that the Crown had conceded that s 2.(b) was violated here, and opened the door to the possibility that it might not be so protected. Is there a basis under the

prevailing case law to argue that s. 2(b) does not protect the possession of this material? Does the Crown's concession preclude the Court as a whole, or any of its members, from considering whether there is a breach of s. 2A(b)? Is the Court bound to accept this concession? If not, what should the Court do if one or more of its members are doubtful that the concession is warranted?

7. To what extent, if at all, do the majority and the plurality opinions differ on the nature or degree of harm posed by child pornography?

8. To what extent should privacy play a role in the Charter analysis here?

Little Sisters Book and Art Emporium v. Canada (Minister of Justice) [2000] 2 S.C.R. 1120

Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

The appellant bookstore, of which the individual appellants are the directors and controlling shareholders, carried a specialized inventory catering to the gay and lesbian community which consisted largely of books that included gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe-sex advisory material and gay and lesbian erotica. Since its establishment in 1983, the store has imported 80 to 90 percent of its erotica from the United States. Code 9956(a) of Schedule VII of the Customs Tariff prohibits the importation of "[b]ooks, printed paper, drawings, paintings, prints, photographs or representations of any kind that . . . are deemed to be obscene under subsection 163(8) of the Criminal Code". At the entry level, Customs inspectors determine the appropriate tariff classification, pursuant to s. 58 of the Customs Act. The classification exercise under Code 9956 largely consists of the Customs inspector making a comparison of the imported materials with the illustrated manual accompanying Memorandum D9-1-1, which describes the type of materials deemed obscene by Customs. At the relevant time, an item considered "obscene" and thus prohibited was subject (under s. 60 of the Act) to a re-determination upon request, by a specialized Customs unit, and upon a further appeal subject to a further re-determination by the Deputy Minister or designate.

Once these administrative measures have been exhausted, an importer may appeal the prohibition under s. 67 of the Act to a judge of the superior court of the province where the material was seized, with a further appeal on a question of law to the Federal Court of Canada, and then with leave to the Supreme Court of Canada. Section 152(3) provides that in any proceeding under the Act the burden of proof in any question in relation to the compliance with the Act or the regulations in respect of any goods lies on the importer.

preferred position. ...

Notes and Questions

1. What are the advantages and disadvantages of the Roth approach as compared to the Butler approach to the constitutional treatment of pornographic materials?

2. What is it about such materials that leads the Roth court to exclude it from constitutional protection? What is it about such materials that leads the Butler court to lead it to secure prima facie constitutional protection under s. 2(b), while ultimately permitting its legislative regulation under s. 1 of the Charter?

3. Would the Roth reasoning support a finding that racist hate propaganda is undeserving of First Amendment protection? Can one justify in principle the U.S. approach which denies First Amendment protection to obscenity, while extending strong constitutional protection to hate speech?

(B) The Distinction Between Obscenity And Pornography

American Booksellers Association v. Hudnut, 771 F.2d 323 (1985) (7th Cir.).

Easterbrook, Circuit Judge:

Indianapolis enacted an ordinance defining "pornography" as a practice that discriminates against women. "Pornography" is to be redressed through the administrative and judicial methods used for other discrimination. The City's definition of "pornography" is considerably different from "obscenity," which the Supreme Court has held is not protected by the First Amendment.

To be "obscene" under Miller v. California, 413 U.S. 15 (1973), "a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794, 2800 (1985). Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than "normal, healthy sexual desires" (Brockett, 105 S.Ct. at 2799) are essential elements of "obscenity."

"Pornography" under the ordinance is "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

IV

The definition of "pornography" is unconstitutional. ...

No amount of struggle with particular words and phrases in this ordinance can leave anything in effect. The district court came to the same conclusion. Its judgment is therefore affirmed.

[The concurring opinion of Senior Circuit Judge Swygert is omitted.]

Notes and Questions

1. What is the difference from the constitutional perspective between obscenity, as understood in the Roth case, and pornography, as discussed in the Hudnut case?

2. If retained to defend the Hudnut legislation in Ontario, if it formed part of the Ontario Human Rights Code, what arguments would you make in its defence in light of Butler? Is the Hudnut reasoning compatable with Butler's? What evidence would you fashion to found a defence to the Hudnut legislation?

3. Does the Hudnut reasoning embody any constitutionally-official ideology about the relations between the sexes?

(c) Applying the Traditional U.S. Approach

Skywalker Records Inc. v. Navarro, S.D. Circuit Court, Broward County, Florida, June 6, 1990.

[The recording As Nasty As They Wanna Be was released to the public by 2 Live Crew in 1989. In mid-February 1990, the Broward County Sheriff's office began an investigation of the Nasty recording, in response to complaints by South Florida residents. On March 9, Judge Grossman issued an order explicitly finding probable cause to believe this recording was obscene under section 847.011 of the Florida Statutes and under applicable case law. The Broward County Sheriff's office received and copied the order, and distributed it county wide to retail establishments that might be selling the Nasty recording. Within days, all retail stores in Broward County ceased offering the Nasty recording for sale. On March 16, 1990, the plaintiffs filed this action in federal district court. On March 27, 1990, Sheriff Nicholas Navarro filed an

The plaintiffs themselves testified that neither their music nor their lyrics were created to convey a political message. ...

Prior to Miller, the government had to demonstrate that a work was utterly without redeeming social value to be judged obscene. ... The present test is less stringent, only requiring proof of an absence of serious social worth. This leads to the plaintiffs' strongest argument: that the Nasty recording has serious artistic value. This category of social worth is broad enough to include the value contributed by the political, literary, and cultural aspects of the particular work.

The plaintiffs stress that the Nasty recording has value as comedy and satire. Certainly, people can and do laugh at obscenity. The plaintiffs point to the audience reaction at trial when the subject recording was played in open court. The audience giggled initially, but the court observed that after the initial titillation, it fell silent. ...

The Nasty recording is not comedy, but is first and foremost, music. Initially, it would appear very difficult to find a musical work obscene. As noted by the American Civil Liberties Union, the meaning of music is subjective and subject only to the limits of the listener's imagination. ...

Obscenity? Yes!

The recording As Nasty As They Wanna Be, taken as a whole, is legally obscene.

The court so finds by a preponderance of the evidence although the standard of proof presents no real issue.

The court also finds As Nasty As They Wanna Be to be legally obscene under the Miller test by clear and convincing evidence, which standard the plaintiffs maintain is the correct burden of proof.

Notes and questions

1. "Too Cruel, Live", The New Republic, July 9 & 16, 1990, had this to say on the matter of 2 Live Crew:

> Censorship is a stain on civilization, but it is an old story that censorship also adds an extra-aesthetic fascination to art, that it raises the artist into a hero. In truth, there are certain sorts of art for which censorship is a lucky break, particularly in an open society with a free market, in which censorship is doomed anyway to fail. The rap group 2 Live Crew is enjoying such a break. They owe a great deal to the yahoo representatives of the law in Orlando County, which declared their record "obscene" and arrested two of the group's

members for performing it (and one record dealer for selling it).

About the right of 2 Live Crew to record and to perform their "music," about the right of record dealers to sell it and the right of consumers to buy it, we give no quarter: the United States is a free country and there is no expression of its culture that does not deserve the protection of its freedoms. The arrest of performers and record dealers is a shabby, frightened, un-American thing. In the case of 2 Live Crew it might also be a racist thing: Andrew Dice Clay has also gained fame and fortune calling women "bitches" and his record rests undisturbed in the stores.

But the First Amendment's protection of 2 Live Crew is where the discussion should begin, not where it should end. As Nasty As They Wanna Be is nothing if not obscene. Its subject, its only subject, is domination through sex. The rhythms and the arrangements are, by the standards of rap music, conventional; and the musical references are thoroughly banal. The innovation here is the language. The lyrics of these "songs," to a degree that is probably unprecedented in American popular music, drip with contempt for women, for black women especially. They are compared to whores and dogs. The chanting about (children, cover your parents' eyes and ears) "cunts," "dicks," "pussy," and "cocks" knows no end. These wounded sensibilities are not breaking new ground in metaphor: "forget the salad, just eat my meat" is about as subtle and as symbolic as they get.

Oh, for the days when we could make our First Amendment fights for Ulysses and Lady Chatterley's Lover. The currency of cultural martyrdom has been devalued. But there are some who would not agree, and they have found a home in the pages of The New York Times. The paper's rock critics are regularly laughable in their nervous translations of the primal and the obscene into the polysyllabic prettifications of their trade. 2 Live Crew maintains that "I can't be pussywhipped by a dicksucker," and Jon Pareles explains that "rappers live by their wit--their ability to rhyme, the speed of their articulation--and by their ability to create outsized personas [sic] with words." He also avails himself of the understanding of Professor Henry Louis Gates Jr. of Duke University, whose marriage of post-structuralism and Spike Lee has made him the most widely cited black critic of the day. "The rappers take the white Western culture's worst fear of black men and make a game of it," Gates instructs the man from the Times.

Nice try. What 2 Live Crew takes is the black man's worst fear of the black woman; and if it makes a game of it, the game is not exactly fun. Racism is no more responsible for the misogyny of 2 Live Crew than anti-Semitism is responsible for the misogyny of Andrew Dice Clay (once Andrew Silverstein). A few days later Gates appeared on the Times op-ed page to "decode" 2 Live Crew for the millions of us who were dead to the esoteric dimensions of the work. One of the strengths of this stuff, one would have thought, is its directness, its literalness; but no, the genital madness of 2 Live Crew is "allegorical," because all persecuted people are forced to speak in codes (a Straussian

reading of rap, at last!), and "parodic," because hyperbole and extravagance are a retort to the conventions of a culture. "It recalls the inter-sexual jousting in Zora Neale Hurston's novels," Gates says smugly. About the difference between jousting and wilding, Gates is silent, as he is silent about how you might impress that distinction upon the minds of kids to whom you have warmly recommended this music. (Never mind the insult to Hurston.) To understand 2 Live Crew, he concludes, we must become "literate in the vernacular traditions of African Americans."

There are mistakes of which only professors are capable, and this is one of them. The problem is not only that the professor is foolish; the problem is also that he is, intellectually at least, a counsellor of despair. When you promote "suck my dick, bitch, and make is puke" into a "vernacular tradition," you wound your culture. You teach that your culture need aspire to nothing high, because the low *is* the high; and that your culture--in this instance, the culture of Ellington and Ellison--need look no further than the street. Gates's apology for 2 Live Crew is more proof of the idealization of the street that now lies at the heart of African American culture. The truth about the street, of course, is that it is the site of the greatest catastrophe to have befallen black America since slavery.

In recent years we have heard a good deal about the crisis of the black American male. There is no more definitive document of that crisis than As Nasty As They Wanna Be. The pathetic sexual violence of Eddie Murphy has been exceeded, and a prominent black intellectual has stepped forward to congratulate these posers, to call them victims and heroes. He, of course, is free to do so; and they, of course, are free to make their music; and we, of course, are free to be alarmed and appalled.

2. "Correspondence", The New Republic, August 13, 1990.

Too cool jive

To the editors:

What's truly more "laughable," that rock critics debate the worth of 2 Live Crew's work, or that TNR is now where we should turn for a proper understanding of rap music ("Too Cruel, Live" July 9 & 16)? Tell me, who's your favorite--do you like Kool Moe Dee or are you more the L.L. Cool J type?

You claim that only a professor could be foolish enough to make a cultural and historical case for 2 Live Crew. This is the Jesse Helms argument--upholding smug, self-righteous "common sense," according to which anything with ugly content ultimately has no worth. Never mind that this is the exact same argument used against Ulysses and Lady Chatterley's Lover--and also against the type of music made by your vaunted exemplar of street transcendence, Duke Ellington.

Steven Kurtz
Los Angeles, California

To the cditors:

Langston Hughes, Sterling Brown, Zora Neale Hurston, and countlcss others spent their lives trying to invalidate the invidious distinction between "high" and "low" in black culture, and in your editorial on 2 Live Crew you resurrect it in one fell swoop. Ellington and Ellison are high culture; rap music is low. I suppose Hughes and Brown, who made poetry out of "street" language, would also be low culture, not to mention those other purveyors of "street" language, Richard Wright, Sonia Sanchez, Quincy Troupe, etc.

Unlike white American literature, where God forbid that a poet should incorporate lyrics from a honky-tonk song, black literature has always felt comfortable with its borrowings from "the street," and this is in large part why black American music, poetry, fiction, and art has survived--against amazing odds--as an intcllectually honest and passionate body of work.

Yuval Taylor
Brooklyn, New York

3. In Skyywalker, supra, the court explicitly relied on itself, and its own subjective pcrccptions of public taste and standards, to identify thc constitutional yardstick against which the impugned rccording was to be judgcd. It made no effort to dress this fact up in doctrinal language, or to simply deny that it was doing so. Is this approach appropriate under **Charter** s. 2(b)? Should it be condemned as wholly contrary to the rule of law, or should it be applauded as a realistic recognition of how judges actually decide individual cases?

4. What is the diffcrencc between obsccnity and pornography?
5. If a judge is not to rely on his or her own subjective perceptions of public standards, how should public standards bc proven? Public opinion polls? Can an effective public opinion survey be conducted on the impugned regulation without first disseminating the impugned item? Would this be legal, if the record turns out to be illegal?

6. For constitutional purposes, should there be any different standard of justification rcquired depcnding on whether the impugned law:

(a) criminalizes the sale or public cxhibition of the proscribed material;

(b) makes thc distributor of the proscribed material subject to civil action for discrimination at the instance of a private party;

(c) subjects the public exhibition of the proscribed material to screening by a censor board.

7. Can the Hudnut reasoning be distinguished in Canada because of different constitutional treatments of gender equality under the constitutions of the two countries?

(d) THE DISTINCTION BETWEEN POSSESSION AND DISTRIBUTION

Osborne v. Ohio, 495 U.S. 103

[In order to combat child pornography, Ohio enacted legislation which provides in pertinent part:

(A) No person shall do any of the following:

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

Petitioner, Clyde Osborne, was convicted of violating this statute and sentenced to six months in prison, after the Columbus, Ohio, police, pursuant to a valid search, found four photographs in Osborne's home. Each photograph depicts a nude male adolescent posed in a sexually explicit position.]

White, J.: ...

I

The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether, as Osborne argues, our decision in Stanley v. Georgia, 394 U.S. 557 (1969), compels the contrary result. In Stanley, we struck

other means available to Ohio to protect children from exploitation and the State's failure to demonstrate a causal link between a ban on possession of child pornography and a decrease in its production. ...

IV

When speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law. I respectfully dissent.

Notes and Questions

1. Does the majority here effectively reverse Stanley v. Georgia, supra? Stanley was a prosecution for knowingly possessing obscene matter contrary to Georgia law, specifically films which were discovered while searching the appellant's home under a warrant on an unrelated matter. He challenged his conviction, arguing that the Georgia statute, insofar as it punished mere private possession of obscene matter, violated the First Amendment. The Supreme Court stated, in material part:

> In this context, we do not believe that this case can be decided simply by citing Roth [v. U.S.]. Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. ... Roth and the cases following it discerned such and "important interest" in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.
>
> It is now well established that the Constitution protects the right to receive information and ideas. ... Moreover, in the context of this case - a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home - that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusions into one's privacy. ...
>
> [W]e think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his

own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. [at 1246-8].

2. Are there any material constitutional differences between having a photograph of a child, in a sexually explicit scene, in one's home, or posted outside one's store, or in one's wallet as one walks about in public, or on the front of one's sweatshirt while walking about in public?

3. Before a police officer may enter one's house to search for such materials, should the "reasonable and probable cause" standard ordinarily required under **Charter** s. 8 (protection of security against unreasonable search and seizure) for obtaining a search warrant be any different than in the usual case? If so, should it be higher or lower?

3. Should Osborne have been decided differently if the legislation in question only involved pornographic materials involving adults?

(e) The Current Approach to Public Nude Dancing - A New Twist?

Michael Barnes, Prosecuting Attorney of St. Joseph County Indiana v. Glen Theatre, 1991 498 U.S. 807

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion in which **O'CONNOR** and **KENNEDY, JJ.**, joined. **SCALIA, J.**, filed an opinion concurring in the judgment. **SOUTER, J.**, filed an opinion concurring in the judgment. **WHITE, J.**, filed a dissenting opinion, in which **MARSHALL, BLACKMUN, and STEVENS, JJ.**, joined.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents are two establishments in South Bend, Indiana, that wish to provide totally nude dancing as entertainment, and individual dancers who are employed at these establishments. They claim that the First Amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing. We reject their claim... The Kitty Kat Lounge, Inc. (Kitty Kat) is located in the city of South Bend. It sells alcoholic beverages and presents "go-go dancing." Its proprietor desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity requires that the dancers wear "pasties" and a "G-string" when they dance. The dancers are not paid an hourly wage, but work on commission. They receive a 100 percent commission on the first $60 in drink sales during their performances. Darlene Miller, one of the respondents in the action, had worked at the Kitty Kat for about two years at the time this action was brought. Miller wishes to dance nude because she believes she would make more money doing so. Respondent Glen Theatre, Inc., is an Indiana corporation with a place of business in South Bend. Its primary

dancing ... lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance.' Martin, J. Introduction to the Dance (1939). Aristotle recognized in Poetics that the purpose of dance is 'to represent men's character as well as what they do and suffer.' The raw communicative power of dance was noted by the French poet Stephane Mallarme who declared that the dancer 'writing with her body ... suggests things which the written work could express only in several paragraphs of dialogue or descriptive prose.'...

FN2 JUSTICE SOUTER agrees with the Court that the third requirement of the O'Brien test is satisfied, but only because he is not certain that there is a causal connection between the message conveyed by nude dancing and the evils which the State is seeking to prevent. See ante, at ---. JUSTICE SOUTER's analysis is at least as flawed as that of the Court. If JUSTICE SOUTER is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive. Furthermore, if the real problem is the "concentration of crowds of men predisposed to the" designated evils, ante, at ---, then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity.

Notes and Questions

1. According to this case, when does nude dancing amount to expression which at least prima facie merits First Amendment protection?

2. Compare the approach taken in this case by the various opinions to that taken in Irwin Toy to the question of when conduct can constitute expression. How are they similar and how are they different? Is the simple existence of an attempt to convey meaning sufficient in the Glen Theaters case?

3. It appears that there was nothing before the Supreme Court to document the legislative reasons for enacting the ban on nude dancing. How did the justices get around this problem? Are their methods for doing so acceptable and persuasive?

4. When should morality amount to a sufficient justification for banning expressive conduct?

5. Compare the approach in Glen Theaters to that in Irwin Toy on the role of legizlative purpose versus legislative effects on the appraisal of a law's constitutionality. How are they similar and how are they different?

6. Does the impugned law aim at suppressing expressive conduct on account of its expressive

message, or for some other reason?

7. Would the Indiana law impugned here be defensible in Canada? If so, would it be under s. 2(b) or s. 1 of the Charter? What evidence if any would be necessary to defend it?

5. FEMINIST PERSPECTIVES ON THE REGULATION OF PORNOGRAPHY

Kathleen Mahoney; "Speaking Notes for the Conference on International Human Rights, Banff, Alberta, November 10, 1990".

What is pornography? Is it a legitimate form of expression that should be protected by freedom of expression guarantees? Or is it a particularly invidious practice of sex discrimination that should be curtailed in order to protect women's equality rights? These important questions need to be answered because even though a number of international instruments address obscene expression, none offer any guidelines as to the content or definition of pornography. Even the 1983 U.N. Resolution based on the Special Report on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, stopped short of providing a definition. It merely recommended that Member States draw up policies aimed at "curbing the pornography industry and the trade in pornography. In the meantime, pornography has become a major world industry in virtually all media forms. Movies, videos, films, magazines, posters and television routinely present audiences with themes of sexual violence and exploitation of women as entertainment. This is accomplished in the face of the Convention on the Elimination of All Forms of Discrimination Against Women, which requires that States Parties take appropriate measures:

(a) "To modify the social patterns and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women.

By leaving the decision of the definition of pornography up to individual member states, incoherency in international and national policies is guaranteed. Without a precise definition identifying pornography as a vehicle that debases women, putting them at less than a human level, international statements ensuring equality to women in all realms of social life are meaningless and unenforceable.

It is quite clear that the void created by the absence of definition and clarity with respect to pornography has been filled by the traditional liberal approach to free speech. It is argued here the liberal approach is incapable of dealing with pornography. Its reliance on abstract values grounded in seventeenth and eighteenth century thinking ignore or fail to recognize that the

In conclusion, it is apparent that liberal views are not as liberating and fair as theorists would have us believe. When tested against the theories and analyses of those who seek social equality with the dominant white, male elite, liberalism reveals itself as limited in scope. The centrality of the autonomous and undifferentiated individual to liberal thought shows how its abstract principles fail to address the historically specific oppression actually experienced by dominated groups.

Notes and Questions

1. To what extent does the Butler decision reflect this commentator's views, and to what extent does it differ from them?

2. To what extent can this commentator's views be analogized to the status of persons with disabilities in Canada? Would restrictions on the public depiction of persons with disabilities which are stereotypical be justifiable on her approach?

3. What degree of restriction on publications depicting women could be justified on this commentator's approach?